85-1335

Supreme Court, U.S.
FILED
FEB 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

Emma F. Gilmere, individually, and as Administratrix of the Estate of Thomas E. Patillo, and for the benefit of his next of kin, ***Petitioner***

v.

City of Atlanta, Georgia, R. C. Sampson, Lee P. Brown, Maynard Jackson and George Napper, ***Respondents***

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

J.M. Raffauf
Attorney for Plaintiff/
Cross-Petitioner
1341 Thomas Road
Decatur, Georgia 30030
(404) 371-2222

QUESTIONS PRESENTED FOR REVIEW

1. Whether the circuit court of appeals, below, in reversing the district court, correctly applied City of Oklahoma v. Tuttle, infra, in holding that Plaintiff had not established a policy of municipal liability which resulted in the death and injuries to Plaintiff's decedent.

2. Whether the circuit court below, in reversing the district court, correctly interpreted and applied the principle of gross negligence and deliberate indifference supporting municipal liability in civil rights actions brought under 42 U.S.C. 1983.

3. Whether the courts below correctly construed and applied theories of supervisory liability in civil rights actions brought under 42 U.S.C. 1983.

4. Whether the courts below erred in failing to mandate the award of state statutory damages for the wrongful death

of the decedent since Plaintiff had prevailed on her constitutional deprivation of life claim brought under 42 U.S.C. 1983.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	
OPINIONS BELOW	2
CONSTITUTIONAL/STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	5
REASONS FOR ALLOWING THE WRIT	
I. The decision of the Court of Appeals, reversing the district court, that Plaintiff had not established a municipal policy which resulted in death and injury to Plaintiff's decedent conflicts with the decisions of this Court in City of Oklahoma v. Tuttle and Monell v. Department of Social Services, infra.	26
II. The decision of the Court of Appeals, in reversing the district court, that the facts proved by Plaintiff did not establish municipal liability under the theories of gross negligence and deliberate indifference is in conflict with decisions of other	

federal courts and is an issue which has not been, but should be, addressed by this Court. 43

III. This Court should grant certiorari to resolve conflicts with the lower courts that continue to erode the imposition of liability upon supervisory defendants in actions brought under 42 U.S.C. 1983. 50

IV. The decision of the courts below in not mandating the award of state statutory damages in actions brought under 42 U.S.C. 1983 are in conflict with the decisions of this Court and federal courts below. 54

CONCLUSION

CERTIFICATE OF SERVICE

APPENDIX I

Opinions, United States District Court, Northern District of Georgia, Atlanta Division, dated June 21, 1982 and August 9, 1982. 1a

APPENDIX II

Opinion, United States Court of Appeals for the Eleventh Circuit, en banc, entered October 15, 1985. 1a

TABLE OF AUTHORITIES

Supreme Court Cases	Page
Addickes v. S.H. Kress & Co., 398 U.S. 144 (1970)	35
Carey v. Piphus, 435 U.S. 247 (1978)	55,58
City of Oklahoma v. Tuttle, ___U.S.___, 105 S.Ct. 1 (1985)	31,44,50
Delaware v. Prouse, 440 U.S. 648 (1979)	28
Estelle v. Gamble, 429 U.S. 97 (1976)	45
Imbler v. Pachtman, 424 U.S. 409 (1976)	55
Jones v. Hildebrandt, 432 U.S. 183, (cert. dismissed as improvidently granted)	56
Monell v. Department of Social Services, 436 U.S. 658 (1981)	26,27,35,36,38
Owen v. City of Independence, 445 U.S. 622 (1980)	27,30
Parratt v. Taylor, 451 U.S. 527 (1981)	34,46
Polk County v. Dodson, 454 U.S. 312 (1981)	36,44

Robertson v. Wegman, 436 U.S. 584 (1978) 58,60

Tennessee v. Garner, ___U.S.___, 105 S.Ct. 1694 (1985) 14

Wilson v. Garcia, ___U.S. ___,105 S.Ct. 1938 (1985) 55

Other Federal Cases

Bennett v. City of Slidell, 735 F.2d 861 (5th Cir. 1984) (en banc) 38

Beverly v. Morris, 476 F.2d 1357 (5th Cir. 1979) 38

Bonsignor v. City of New York, 521 F. Supp. 394 (S.D.N.Y. 1981) 40

Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961) 24,56

Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1974) 54

Dollar v. Haralson, 704 F.2d 1540 (11th Cir. 1983) 48

Gilmere v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985) (en banc) 2,7,9

Hild v. Bruner, 496 F. Supp. 93 (D.C.N.J. 1980) 40

Jenkins v. Averitt, 424 F.2d 1228 (4th Cir. 1970) 46

Johnson v. Duffy,588 F.2d 740 (9th Cir. 1978) 52

Johnson v. Glick, 481 F.2d 1028 (2nd Cir. 1972) 42

Leite v. City of Providence, 463 F. Supp. 585 (D.C.R.I. 1978) 43,47

Logan v. Smith, 718 F.2d 756 (5th Cir. 1978) 49

Mayes v. Elrod, 470 F. Supp. 1188 (N.D. Ill. 1979) 38

McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979) 38,53

Morrison v. Washington County, 700 F.2d 678 (11th Cir. 1982 48

Norton v. McKeon, 44 F.Supp. 384 (E.D. Penn. 1977) 52

Owens v. Haas, 601 F.2d 1242 (2nd Cir. 1972) 46,54

Parker v. McKeithen, 488 F.2d 553 (5th Cir. 1973) 43,46

Reeves v. City of Jacksonville, 608 F.2d 644 (5th Cir. 1979) 45

Roberts v. Williams, 456 F.2d 819 (5th Cir. 1972) 50

Sims v. Adams, 537 F.2d 829 (5th Cir. 1976) 46,53

Smith v. Hall, 510 F. Supp. 767 (D.C. Utah 1981) 52

Trezevant v. City of Tampa, 741 F.2d 336 (11th Cir. 1985) 39,41

Turpin v. Mailet, 619 F.2d 196 (2nd Cir. 1980) 38,53

Wanger v. Bonner, 621 F.2d 675 (5th Cir. 1980) 39,51,53

Whitehurst v. Wright, 592 F.2d 834 (5th Cir. 1979) 45,54

Whirl v. Kern, 619 F.2d 196 (2nd Cir. 1983) 53

Williams v. Bennett, 689 F.2d 1370 (11th Cir. 1980) 48

Williams v. Kelley, 624 F.2d 695 (5th Cir. 1980) 8

Constitutional & Statutory Provisions

Fourth Amendment 4

Sixth Amendment 4

28 U.S.C. 1254 3

42 U.S.C. 1983 4,54,55,57,59

Rule 52, F.R.C.P. 21

Rule 59, F.R.C.P. 21

Rule 60, F.R.C.P. 21

Ruke 19.5, Revised Rules of the Supreme Court of the United States 3

Georgia Law

OCGA 19-7-1 24

OCGA 51-4-2,5,9 22,55,58

OCGA 16-3-21 7

Spradlin v. State, 151 Ga. App. 585 (1979) 7

Other Authorities

Atlanta City Charter, Sections 1-104, 3-106, 8-101,102,107 19,20

Eldridge, Ga. Wrongful Death Sec. 10-42 59

ABA,Standards for Criminal Justice (2ed. 1980) 29

W. Prosser, Handbook of the Law of Torts, (4th ed. 1971) 27

6A C.J.S., Assault & Battery, Sections 19(b), 21 7

Local Rule 181.2 (U.S.D.C.N.D.Ga.) 23

H.R. Moch Co. v. Rensseloer Water Co., 247 N.Y. 160, 159 NE 896 (1928) 32

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Emma F. Gilmere, individually, and as Administratrix of the Estate of Thomas E. Patillo, and for the benefit of his next of kin,

Petitioner

v.

City of Atlanta, Georgia, R. C. Sampson, Lee P. Brown, Maynard Jackson and George Napper,

Respondents

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Emma F. Gilmere, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered October 15, 1985.

OPINIONS BELOW

The opinions of the United States District Court, Northern District of Georgia, entered June 21, 1982 and August 6, 1982, are set out in Appendix I hereto, page 1a, infra. The opinion of the United States Court of Appeals for the Eleventh Circuit, sitting en banc, entered October 15, 1985, is set out in Appendix II hereto, page 90a, infra, and is recorded at 774 F2d 1495 (11th Cir., en banc, 1985).

JURISDICTION

This is a cross-petition for a Writ of Certiorari timely brought under Rule 19.5, Revised Rules of the Supreme Court of the United States. Petitioner seeks to have the Court review the order of the United States Court of Appeals for the Eleventh Circuit entered on October 15, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment

Sixth Amendment

Eighth Amendment

Fourteenth Amendment

42 U.S.C. 1983

28 U.S.C. 1254

STATEMENT OF THE CASE

On New Year's Day, 1980, Thomas A. Patillo was forcibly removed from his house during a police investigation and then was shot and killed by R. C. Sampson, an on-duty police officer employed by the City of Atlanta (R379)*. Plaintiff Emma F. Gilmere, Patillo's sister and the administratrix of his estate, brought this action on behalf of Patillo's estate and "for the benefit of his next of kin," his seven brothers and sisters. (R8,9, T141). This civil rights action was brought under 42 U.S.C. Sections 1983 and 1988 on February 1, 1980 (R7).

On June 21, 1982, after a two week trial, the district court made findings of fact and conclusions of law, finding Craig and Sampson individually liable for excessive use of

---

*References to the record are designated herein as (R); references to the trial transcript as (T); exhibits and depositions admitted into the record are referred to by their exhibit numbers.

force in beating the decedent and assessed $1,000.00 in general damages and $4,000.00 in punitive damages (R379). The court specifically found that the officers maliciously beat Patillo before they killed him (T391)

> The court has found, however, that both officers were not merely holding on to Patillo's struggling arms, as they testified, but were striking Patillo with little or no provocation by the time they reached the back of the patrol car. Thus, they applied more force than was necessary to control Patillo. The court also concludes that the blows were not delivered in a good faith effort to control Patillo, but rather out of irritation at his intitial resistance to question him. (T391).

The district court also found Sampson and the City of Atlanta liable for the deprivation of the decedent's life and assessed $20,000.00 in general damages (R407). In its order denying Plaintiffs' motion to alter or amend judgment, the court reiterated that decedent was unconstitutionally deprived of

his life (R432). The court rejected the officers' testimony that Patillo had grabbed a gun, noting that the eight other witnesses had not seen a gun in Patillo's hand (T393). The court found that when Patillo was pushed or lunged toward Sampson, that Sampson "reacted by drawing his own revolver and shooting Patillo twice at close range in the abdomen" (T384).*

---

*Self defense is simply not an issue in this case. Self defense is not available in a civil or criminal action to anyone who is the aggressor. O.C.G.A. 16-3-21(b) or by one who initially provokes the use of force with the intent to use such force as an excuse to inflict bodily harm upon the assailant. O.C.G.A. 16-3-21(b)(1). Spradlin v. State, 151 Ga.App. 585 (1979). See Gilmere, supra at 1501:

> Here, however, any fear on the officer's part was the fear of retaliation against his own unjustified physical abuse. We conclude that a moment of legitimate fear should not preclude liability for a harm which largely resulted from his own improper use of his official power.

See generally 6 A.C.J.S. Assault and Battery, Sections 19b, 21.

"After balancing the Williams factors, the court again concludes that the force employed, this time by Sampson alone, was so excessive as to create 1983 liability and therefore concluded that Defendants had deprived deceased of the right not to be deprived of life or liberty without due process of law." (R390, 392).

As to the supervisory defendants named by the Plaintiff - Mayor Jackson, Commissioner Brown and Chief Napper - the court found for them, finding no direct firmative link between the shooting and them (T396). The court specifically found on the evidence at trial as to these defendants, that Plaintiff showed that they "had the mere right to control" the activities of the officers (T396). The court, however, did find that other supervisors, not sued, did improperly select and train the officers (R380).

As the Court of Appeals noted, the Plain-

tiff presented several theories of municipal liability (R399). Id. 774 F2d at 1512. (Johnson dissenting). Although the court did not find against the Plaintiff on these theories, it found that it need consider only one (T399). On appeal Plaintiff contended the ruling of the district court was that affirmative policies were found by the court to be the causal link. Nevertheless, the majority opinion of the circuit court addressed only the gross negligence and deliberate indifference theory of liablity.

Sampson joined the Atlanta Police Department in 1973 (T245). The background investigation at the time revealed that he had no criminal record, but had incurred ten traffic tickets for moving violations between December, 1969 and June, 1972; these violations had at one time resulted in suspension of his driver's license (Ex. P-33). It was not the practice of the Atlanta Police Department in 1973 to administer psychologi-

ical tests to its applicants, and Sampson received no such testing then or even when he was rehired in 1979 (T246). When originally hired, Sampson's personnel record shows he was a marginal candidate (T247, Ex.P-8, T826). A polygraph showed numerous thefts from a previous employer (Ex.P-8). Sampson received the standard 1973 police academy training, which he recalled as being one week on the pistol range and five weeks in the classroom (T255). (See also Ex.P-14). In his testimony, as the court noted, Sampson had some difficulty recalling the substance of his training courses (R388). Sampson could not recall any training on the use of force to detain suspects (T259). Sampson could not recall any training in hand-to-hand combat, nor training in investigatory stops (T267). He could not define probable cause and did not think Terry searches applied to non-

arrest situations (T264, 273). Although the City claimed that the officers received roll call training and additional training each year of one day at the firing range, Sampson could not recall any such additional training (T306,307). Nor could Officer Craig remember any deadly force training or regulations, saying it was "mainly on the individual" (T239).

Between 1973 and 1978, citizens filed at least wo complaints against Sampson alleging misconduct (Ex.P-33, 34). One of these complains involved the use of excessive force (Ex.P-34). These complains were investigated by the Department and Sampson was exhonerated in one case (Ex.P-31), p.2,R388). However, a complaint of verbal abuse by a motorist who he had stopped illegally was sustained(Ex.33). There are two performance evaluations regarding Sampson in the record, although the Department supposedly has annual evaluations of its officers (T1396). The missing evalutions

were never accounted for. One covers November 1976 through March 1977, and rates Sampson as average in all eight categories (R388, T831). Sampson's supervisor suggested that he could improve in the "public relations area" "by curbing temper ....and maturing." (Ex.P-36, p.2). As to "judgment" the report noted a need for improvement in Sampson's "judgment in tight situations" (Id. at 4). The second evaluation which covers April, 1977 through September 30, 1977, rated Sampson above average in six categories and excellent in two others and contained no suggestions regarding the need for improvement (Ex.P-35). But no corrective action was taken and Sampson claimed he did not know about the report (T831).

Sampson resigned from the Department in March, 1978 but despite his resignation the Department "suspended him" in November

of 1978 for marijuana use, apparently when he applied for reinstatement as a police officer (T18,R388). Sampson applied for reinstatement to the Department in late 1978, which was originally denied (T821). He failed a polygraph test regarding the use of drugs and his application was suspended (T818). Sampson insisted that he was retested by another examiner, passed, and therefore he was rehired (T818). But the City witness, Lt. Gambell, said a decision was made to rehire Sampson because of a change in the rules, not because he passed a second polygraph (T1625). Lt. Gambell's review of the file revealed no second polygraph (T1624-26, 1628). Sampson was not given any psychological testing at his reinstatement (T246) and received only one day of reorientation (T260).

On January 1, 1980, the nightstick policy was "use your judgment as to when

you need the nightstick." (T289). Maj. Davis said that officers were taught to have the batons with them always but he didn't know if this training was implemented (T1498). Craig testified that he was under the impression that the only time he was required to wear his nightstick was at roll call (T1019,20). On the nightstick policy, Sampson said: "I can give you the rule now, but I don't recall what it was back in 73." (T288,299).

James J. Fyfe was called by the Plaintiff as an expert in the area of police training and procedures (T459)*. Fyfe was an Associate Professor at American University and was affiliated with the Police

---

*Fyfe was the Plaintiff's expert in Tennessee v. Garner, ____U.S.____, 105 S.Ct. 1694 (1985) whose work "Observations on Police Deadly Force" was cited by the Court. Id 105 S.Ct. at 1701 fn. 10.

Foundation in Washington, D.C. (T45). Fyfe had been a policeman over fifteen years, including a beat cop for eight years (T459). Fyfe has a Ph.D. in Criminal Justice from the State University in Albany, New York (T459).

Regarding the use of deadly force, Fyfe cautioned:

> "I don't think we can look at the instant that the officer pulls the trigger. It is a process that begins when he becomes aware that he may confront a potentially violent individual, and everything he does from that point on helps to determine the outcome of the shooting." (T534).

Fyfe testified that he studies the training program for Atlanta policemen and that he had studied the facts of this case (T535). Fyfe testified that it was his opinion that the deadly force training by the Atlanta Police Department did not conform to generally accepted principles and standards in this area (T542). Fyfe also testified that the overall training was "inadequate" (T549).

Fyfe said that the overall training was quantitatively inadequate (T561) and cited the fact that the generally accepted standard was over 1000 hours of training whereas Atlanta policemen received half this amount and in fact Sampson had only received one-fourth of this amount (T618). Fyfe also cited other deficiencies in Atlanta's training program, most notably that there was no follow-up or continuing training (T618), there was no in-service training (T620) and there was no monitoring of the implementation of the training in the field or feedback to the Academy (T620). Even thought the curriculum had changed since Sampson was trained Fyfe noted there had been no attempt to bring Sampson's level of training up (T562). Fyfe also noted that Sampson admitted training deficiencies but that the Department did not have any procedure in effect for identifying and correcting such training deficiencies (T564).

Fyfe also testified that it was the generally accepted standard that all policemen carried nightsticks at all times (T588). Fyfe noted that the Atlanta Police Department policy on batons was therefore not in conformity with the accepted standards (T584). The court specifically noted "The alleged failure to clearly require officers to carry their nightsticks at all times" (T399). The court future found:

> "Under these circumstances non-deadly force should have been sufficient to control Patillo. The officers, of course, had deprived themselves of one effective option by leaving their nightsticks in their patrol cars." (R393).

Fyfe testified that even if the officers' statements were true, that there were numerous alternatives available for subduing Patillo short of using deadly force(T608). Fyfe testified that the policemen should have used restrainig holds. "If those were unsuccessful, the officer should then resort

to their batons." (T608).

Based on these above stated facts, the court found:

> "Atlanta has not 'completely failed to train' its officers; for all practical purposes, however, it certainly failed to retrain Sampson upon his return to the Department. Combined with the Department's failure to administer any psychological tests to Sampson upon his return to duty, this failure to retrain him constitutes gross negligence. It should have been obvious that Sampson's return to duty without any serious retraining might result in violations of the constitutional rights of Atlanta's citizens. The Department's conduct amounts to a deliberate indifference to those constitutional violations. Thus, the City of Atlanta is liable for Sampson's shooting of Patillo. (R400).

Similarly, the Plaintiff presented several theories of supervisory liablity (R155, 347), as discussed infra. Both Sampson and Craig testified that at all times they were acting pursuant to the policies and customs of the Department (T1172,806). The Depart-

mental inquiry backed them up (T1841), Ex. P-1). The head of the training academy testified that at all times the officers acted in accordance with their training (T1476). Even Commissioner Brown testified: "There is nothing to suggest otherwise" (T414).

The Mayor, Police Chief and Commissioner breached their duties arising under the City Charter to control, discipline and train officers (Sec. 8-107, 8-102, 3-106). The City's Charter vests in Defendant Jackson complete authority over the police department (T37, 38,39). Sec. 8-101, id., makes the Public Safety Department an "Executive Branch of the City" and 8-102, id., says that the Commissioner is "under the direction and supervision of the Mayor" although "the Mayor is hereby authorized to delegate the direction and supervision" of the Department, he does so "provided that any such duties delegated by the Mayor shall be exercised under the supervision and

direction of the Mayor" (Sec. 3-106). "All executive and administrative powers of the City are hereby vested in the Mayor and such other administrative officers, departments and agencies created or contained by this charter or now or hereafter established by ordinance." (Sec. 1-104).

As stated above, Plaintiff's expert witness testified there were no procedures in effect for identifying problem officers or training deficiencies (T564). Brown himself said that he would not know about such shortcomings unless, perhaps, a complaint was substantiated or because of press interest (T1402). The Department had annual evaluations but of the two entered into the record, one showed Sampson had public relations problems and could improve by "curbing his temper...and maturing" (Ex.P-36,p.2). Brown testified he had complete authority on personnel decisions and could himself sustain or not sustain com-

plaints (T1403). The Plaintiff presented evidence that Brown had personal knowledge of departmental problems in "non-lethal restraining measures" (T1855). Brown was called before a Fulton County Grand Jury on this point and had several conversations with a member of the City Personnel Review Board on training problems in this area (T1850-1860). The City stipulated that "Jackson, Brown, Napper and the city of Atlanta are responsible for the quality of supervision, training and day to day implementation of police procedures in the Atlanta police department." (T232).

After verdict, on June 25, 1981, Plaintiff filed a Motion to Alter and Amend Judgment pursuant to Rules 52(b), 59(e) and 60(b) of the Fed. R. Civ. P. and as grounds cited the court's error of law in failing to assess state statutory damages and in finding that the decedent's next of kin, here the brothers and sisters of the decedent, had no cause of

action for his wrongful death (R409). The court originally found: "Patrillo, however, left neither widow nor children and his brothers and sisters are not given a wrongful death cause of action by 105-1302. (R402).

Ultimately, construing the motion as one to alter or amend the findings of fact and conclusions of law, since final judgment had not been entered, the court denied the motion (R432). However, the court did admit that it had made a mistake, saying: "This court was not aware that this limitation on the cause of action had been effectively removed by Ga. Code Ann. 105-1309 (O.C.G.A. 51-4-5): (R433). "Thus the court erred in relying on Sec. 105-1302 (O.C.G.A. 51-4-2)" (R433). Nevertheless, the court still declined to assess statutory damages, claiming for the first time that Plaintiff never pled a wrongful death cause of action and that even though Patillo was wrongfully deprived of his life, that, under the Carey compensation

principle "an award of the full value of Patillo's life would overcompensate them" (R435).

The wrongful death claim was pled: "The Plaintiff has suffered the loss of her brother and is entitled to recover damages for the wrongful death" (Para. 23, R13). Paragraph 24 of the Complaint said: "That the defendants' actions are the proximate cause of the death of Thomas E. Patillo and Plaintiff is entitled to recover the full value of his life, and funeral and medical expenses." (R13).

By request of the court, both parties filed written Proposed Findings of Fact and Conclusions of Law (R147). These were filed before trial in conformance with Court Rule 181.2 (N.D.Ga.). The proposed findings of the Plaintiff said: "Besides the action for deprivation of constitutional rights under the Fourth, Eighth and Fourteenth Amendments, for

the deprivation of life, for excessive force and for false arrest and imprisonment, Plaintiff brings several pendent state claims, including wrongful death, assault, battery, false arrest and false imprisonment all arising out of the same nucleus of facts." (R147). The Proposed Findings further stated: "The pendent state claim for wrongful death falls on the next of kin. Ga. Code Ann. 105-1307 (O.C.G.A. 51-4-5); Ga. Code Ann. 74-108 (O.C.G.A. 19-7-1); Brazier v. Cherry, supra." In fact, the court stated at trial that it intended to bind the parties to the cause of action pled in the proposed findings (T138). At trial Plaintiff twice stated the causes of action she was pursuing including "wrongful death and constitutional deprivation of life." (T194,989). There was no objection by the Defendants.

Again in Plaintiff's written Motion for Directed Verdict, Plaintiff stated: "Plain-

tiff has proved by preponderance of the evidence the constitutional violation of wrongful death." (R33). The Motion also said" "Plaintiff has proved by preponderance of the evidence the requisites of the pendent state claims of wrongful death" (R333). The Motion also pointed out that the pendent state action for wrongful death was pled by the next of kin (R337).

REASONS FOR ALLOWANCE OF THE WRIT

I. The Court of Appeals erroneously held that Plaintiff had not established a policy of municipal liability which resulted in the injury and death of Plaintiff's decedent.

In Monell v. New York City Department of Social Services, 436 U.S. 658, 690 (1978), the United States Supreme Court held that the language and legislative history of 42 U.S.C. 1983 holds that municipalities are "persons" to whom 1983 applies and "compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official policy of some nature caused a constitutional tort." The Supreme Court has thus recognized that these actions are tort actions. The traditional elements of a tort are: 1) a duty requiring an actor to conform to a certain standard of conduct; 2) a failure to conform to the standard required, or a breach; 3) a reasonable, close causal connection between the conduct and a resulting injury; and

4) actual loss or damage resulting to another. W. Prosser, Handbook of The Law of Torts, Section 30 at p. 143 (4th ed. 1971).

By terms of the statute itself, the duty is to refrain from conduct that "subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws.." The statutues and constitutional provisions securing these rights are to be liberally and beneficently construed. Owen v. City of Independence, 445 U.S. 622,636 (1980). The duty covers all forms of official violation of federally protected rights. Monell, supra at 700-701.

The purpose of this duty is to increase the attentiveness with which officials at the higher levels of government supervise the conduct of their subordinates. Owen, supra at 652, n. 36. The court goes on to

to explain in the same footnote:

> The need to institute system-wide measures in order to increase the vigilance with which otherwise indifferent municipal officials protect citizens' constitutional rights is, of course, particularly acute where the frontline officers are judgment-proof in their individual capacities.

Id.

A municipality gives its police officers a badge and a gun. with that it vests the officers with the power and discretion to infringe constitutional rights. The Supreme Court has recognized that governmental entities cannot let this discretion go unbridled and should establish standards or rules to govern the exercise of discretion to prevent instrusions upon constitutionally guaranteed rights. Delaware v. Prouse, 440 U.S. 648,661 (1979). Commenting on this matter, Chief Justice Burger has said:

> (N)o public officials...are given such wide discretion... as are police officers...No

> judge can really tell the policeman on the beat how to exercise this discretion perfectly...Yet we must recognize that we need not choose between no guidelines at all and perfect guidelines... (T)here is a need for carefully devised basic standards to guide the exercise of this discretion and...for comprehensive training of officers before they are thrust into situations that would often baffle the wisest judge.

American Bar Association, Standards for Criminal Justice, Vol. I., p. 1.6 (2d.ed. 1980), quoting address by Chief Justice Warren E. Burger at the FBI National Academy Commencement.

In view of the day to day power and discretion of police officers to infringe the constitutional rights of individuals and in view of the recognized need for governmental entities to temper the unbridled use of that power and discretion through rules and standards, the duty of the municipality should be to act reasonably and with prudence.

This duty to use reasonable care should extend to the implementation of municipal policies, ordinances, regulations, decisions or customs that control 1) hiring of police officers; 2) screening officers when assigning duties; 3) training and retrainig of officers; and 4) providing basic standards to guide police conduct and the exercise of discretion. With this type of standard the law can meet its goals of distributing the costs of official misconduct, Owen, supra at 657, and increasing the vigilance with which municipal officials supervise the conduct of their subordinates to protect citizens' constitutional rights. Owen, supra at 652, n.36. The ruling of the district court here is that the City failed in all these respects.

The proof therefore submitted in this case is consistent with the Court's most recent pronouncement and the parameters of

If there is a duty to use reasonable care in trying not to assign persons who react violenty in life and death situations to those jobs where these situations arise, then the complete failure to examine and test officers to see how they react where there are guns and a potential for violence could be a breach of duty through omission. The same standards could be applied to the duty to use reasonable care in training R.C. Sampson or the duty to use reasonable care in providing some rules for when and where officers should have their night-sticks on their persons.

However, courts have reached very different conclusions as to what constitutes a breach of duty. Most of these cases confuse the issue of whether there was a breach with the element of proximate cause. This confusion is repeated by the Defendants where they argue that breaches can occur only when there is persistent, widespread misconduct.

The true breach is in failing to use reasonable care in providing governing standards for the selection, assignment, training and conduct of the officers. The misconduct of the officers may be a result of the breach, but it is not the breach itself.

The element of breach of duty does not contain a state-of-mind requirement. Parrott v. Taylor, 451 U.S. 527,534 (1981). If the state-of-mind requirement did exist, municipalities could argue that they would not know that their actions, or lack of actions, were causing injuries to the public without first seeing some empirical evidence of that result, i.e. persistent, widespread misconduct by their police officers. As the state-of-mind requirement falls, so does the need to prove these persistent, widespread patterns.

This widespread pattern concept is relevant to the issue of proximate causation. The presence or absence of such a pattern is relevant to showing whether or not a consti-

tutional infringement was foreseeable, but, as in tort law generally, common sense tells us that widespread and persistent patterns are not required to prove that a result was the foreseeable consequence of an action. A city may be liable under 1983 for a custom established by those edicts or acts of a city official that "may fairly be said to represent official policy." Monell, supra, 436 U.S. at 694. In Adickes v. S. H. Kress & Company, 398 U.S. 144, 167 (1970), the court held that to be actionable a "'custom or usage' must have the force of law by virtue of persistent practices of state officials." What must be shown are "settled practices of state officials (which) may by imposing sanctions or withholding benefits, transform private predilictions into compulsory rules of behavior." Id. 90 S.Ct. at 1614.

Monell, supra at 690-91,694, provides various standards for the causation require-

ment between the breach and the harm: "responsible for", "caused", "inflicts" and "moving force." Polk County v. Dodson, 454 U.S. 312,326 (1981), draws on the "moving force" language of Monell.

The issue the trier of fact must decide is whether but for the breaching action the injury would not have occurred. The district court so found on the basis of its hearing of the evidence. Absent circumstances that demonstrate that this finding was clearly erroneous, it should be upheld.

The opinion of the Court of Appeals simply ignored the policies relied upon by the district court to support municipal liability. Clearly, the factual basis set forth by the district court in rendering judgment must be interpreted as invoking two separate, distinct and independent theories of liability. That is to say the

the city is liable here, under section 1983, for deprivation of rights secured by the Consititution and inflicted pursuant to official policy or custom and/or gross negligence and deliberate indifference.

The official policies and customs found here by the district court to be the moving force behind the constitutional violations were: (1) the City's training process is inadequate and unconstitutional (R398); (2) failure to require officers to carry night-sticks or provide lesser alternatives to the use of deadly force (R393); and (3) failure to administer psychological tests to Sampson or any officers hired before 1977 (R400). Although the district court did not specifically state that it gave more weight to any one of these four factors, the district court did emphasize the failure to retrain Sampson.

That there has been a failure to

adequately train subordinate officers in just some of the necessary skills is a sufficient basis for liability (R397). McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979). Under Monell municipal liability can be predicated upon either the acts or ommissions of policy-making officials. Turpin v. Mailett, 619 F.2d 196, 200 (2nd Cir. 1980) "At least one form of inaction - failure to supervise-combined with the exercise of some control - may be actionable." Mayes v. Elrod, 470 F. Supp. 1188, 1194 (N.D. Ill. 1979). Accord Beverly v. Morris, 476 F.2d 1357, 1360 (5th Cir. 1979), where liability was imposed where there was a "complete absence of any supervision or training of the deputy marshals in the use of force as well as other applicable areas." Moreover "the policy with respect to recruitment or training (may be) itself unconstitutional." Bennett v. City of Slidell, 735 F.2d 861 (5th Cir. en banc

1984).

Although the training was inadequate the officers did act in accordance with the procedures of the department in carrying out the arrest, shooting and killing. Cf. Wanger v. Bonner, 621 F.2d 675 (5th Cir. 1980). Therefore, it was done in accordance with the official policies of the City. Trezevant v. City of Tampa, 741 F.2d 336 (11th Cir. 1985).

The district court also cited the city policy not to administer any psychological tests to Sampson even upon his return to duty (R400, T246). In fact, no psychological tests were required of any officer until a hiring freeze was lifted in 1977 (T1496, 1497). But even upon his rehiring in 1979 Sampson was not required to undergo testing (R246). This is itself a proper basis of city liability. See Bonsignore v. City of New York, 521 F. Supp.

394 (S.D. N.Y. 1981), which held the city negligent in failing to develop psychological tests which would have demonstrated the police officer was mentally ill or should not have been permitted or required to carry a gun. Accord Hild v. Bruner, 496 F. Supp. 93, 99 (D.C. N.J. 1980): "Newton's failure to conduct some kind of psychological tests of its officers, at least after 1975 (when according to expert testimony, such practice became widely accepted) constituted gross negligence."

The City's policy not to require officers to carry nightsticks was not in conformance with accepted standards for police departments (t584). In its order the district court specifically cited this policy (R397):

> Under these circumstances non-deadly force should have been sufficient to control Patillo. The officers, of

> course, had deprived themselves of one effective option by leaving their nightsticks in their patrol cars. (R399)

Even Defendant Sampson admitted that even based on his own testimony, hindsight showed that he sould have been able to control Patillo without the use of the gun (Sampson deposition 101,111, P.Ex-44). Here, as in Trezevant, supra, at 340, the policy itself is unconstitutional. As Plaintiff's expert pointed out at trial, assuming you believe the officer's testimony as to Patillo's belligerence, there were numerous measures available to the officers here for subduing Patillo, but they either did not know them because of inadequate training, or were precluded from using them by department policy (T608). The constitutionality of Defendants' conduct is to be weighed against such factors as the "relationship between the need and

and the amount of force that was used." Johnson v. Glick, 481 F.2d 1028, 1033 (2nd Cir. 1972).

Not only was the city on notice as to Sampson's training needs, they were aware of deficiencies in the entire police force as to the use of deadly force (T1348). Clearly as applied to Sampson this policy proved to be "disastrous" as"(h)e testified that he did not recall ever being taught any method of dealing with a suspect armed with a gun that did not involve the use of his own weapon." (R399). Additionally a recent county grand jury found "evidence of inadequate training in the area of non-lethal restraining measures" and recommended improvements (R1386). "Rizzo's 'authorization and approval' standards are also satisfied when a supervisory official failed to act or acted inadequately when he had actual or imputed knowledge of a past pattern of police

misconduct or knowledge of well-known, isolated incidents of police misconduct." Leite v. City of Providence, 463 F. Supp. 585 (D.C. R.I. 1978), citing Parker v. McKeithen, 488 F.2d 553 (5th Cir. 1973).

II. The district court correctly held that the City's liability was established by overwhelming proof of the City's gross negligence and deliberate indifference in selecting, training and supervising the officer who beat, shot and killed the Plaintiff's decedent.

The facts of this case overwhelmingly support the finding of the district court that the City is liable because its policymakers were grossly negligent and deliberately indifferent in establishing training and supervision practices that constituted the moving force of the unconstitutional conduct that resulted in the injury and death to Plaintiff's decedent.

The finding of municipal liability by the district court is based on well-

settled principles of gross negligence and deliberate indifference. An act, which has the consequence of depriving someone of his constitutional rights, but which is not the result of official policy or custom, but is nevertheless caused by the City's gross negligence and deliberate indifference, necessarily results in municipal liability. "A single police officer may grossly, outrageously, and recklessly misbehave in the course of a single incident. Such misbehavior may in a given case be fairly attributable to various municipal policies or customs, either those that authorized the police officer so to act or those that did not authorize but nonetheless were the 'moving force', Polk County v. Dodson, 454 U.S. 312, 326 (1981), or cause of the violation." City of Oklahoma v. Tuttle, supra ____ U.S. at _____, 105 S.Ct. at 2436.

The district court here found that the City's "failure to retrain (Sampson) constitutes gross negligence" and that the department's failure to retrain him "amounts to a deliberate indifference to those constitutional violations"(R400). In Reeves v. City of Jackson, 608 F.2d 644 (5th Cir. 1979), the Fifth Circuit, citing Monell, found that "reckless or grossly negligent" conduct in training, disciplining and supervising officers would support municipal liability. Accord Whitehurst v. Wright, 592 F.2d 834 (5th Cir. 1979).

The "deliberate indifference" standard was adoped in Estelle v. Gamble, 429 U.S. 97 (1976). Precedent in the Eleventh Circuit also holds that the deliberate indifference standard as well as the "authorization and approval" standard of Rizzo, are satisfied when a supervisory official fails to act or acts inadequately

when he had actual or imputed knowledge of a past pattern of police misconduct. Parker v. McKeithen, 488 F.2d 553 (5th Cir. 1974); Sims v. Adams, 537 F.2d 829 (5th Cir. 1976). Other circuits have applied the gross negligence standard or similar recklessness standard in non-Eighth Amendment cases. Owens v. Haas, 601 F.2d 1242 (2nd Cir. 1972); White v. Rockford, 592 F.2d 381 (7th Cir. 1979); Jenkins v. Averitt, 424 F.2d 1228 (4th Cir. 1970).

In Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981), this court specifically declined to adopt a standard requiring more than simple negligence. Parratt concluded that "nothing in... section 1983...limits the statute solely to intentional deprivations" or denies liability to a "wrong...negligently as opposed to intentionally committed." Id.

451 U.S. at 534, 104 S.Ct. at 1912. In fact, the Parratt court stated at the outset that it was finally going to decide the unanswered question of "whether mere negligence will support a claim for relief under section 1983." Id. 451 U.S. at 532, 101 S.Ct. at 1911. And the court found that "Section 1983...has never been found by this court to contain a state of mind requirement." Id. 451 U.S. at 534, 101 S.Ct. at 1912.

In applying these standards the district courts have reached various formulations that were relied upon by the district court here. The district court here relied upon the holding in Leite v. City of Providence, 463 F. Supp. 585, 590 (D.C. R.I. 1978):

> If a municipality completely fails to train its police force, or trains its officers in a reckless or grossly negligent manner so that future police misconduct is

> is almost inevitable, the municipality exhibits a "deliberate indifference" to the resulting violations of a citizen's constitutional rights. In such a case, the municipality may fairly be termed as acquiescing in and implicitly authorizing such violation.

Eleventh Circuit cases have also counseled that deliberate indifference and gross negligence will support municipal liability under Section 1983. Dollar v. Haralson County, 704 F.2d 1540 (11th Cir. 1983), held that "negligent breach of a (duty) could give rise to a cause of action based on 1983." In Morrison v. Washington County, 700 F.2d 678, 682 (11th Cir. 1982), lack of supervision and proper training were held to support plaintiff's theories of negligence and breach of duty. "Deliberate or callous indifference" is also recognized in this circuit as a theory of 1983 liability. Williams v. Bennett, 689 F.2d 1370, 1385 (11th Cir. 1982).

Note also Logan v. Smith, 718 F.2d 756, 768 (5th Cir. 1978), which held that a simple negligent failure by a sheriff to properly supervise his jail facilities was actionable.

Sampson's record, as addressed above, clearly showed the need for retraining especially after his request for reinstatement was suspended. But the City did nothing. The record shows that its training program was inadequate, a charge unrebutted by Defendants. The City's policies on use of deadly force were not in conformance with accepted standards. Officers were not taught and did not know self-defense techniques. They were not required to carry nightsticks. No matter what training they did receive, there was no procedure designed to see that it was implemented in the field. The City had notice through the Grand Jury

and the City Personnel Review Board Chairman that its policies on use of force were deficient.

III. The supervisory officials are liable as the proximate cause of decedent's injuries were the policies adopted and affirmed by these officials.

The district court found that the killing was pursuant to a policy and custom of the city but declined to hold the city officials that were sued liable because the district court found "no affirmative link" between Patillo's death and the officers' action other than their "mere right to control" such activities (R-397). Supervisory liability for the officers' conduct will lie "when a clear breach of duty that leads to the injury." City of Oklahoma v. Tuttle, ____U.S.____, 105 S.Ct. at 2432. Roberts v. Williams, 456 F.2d 819, 831 (5th Cir. 1972).

The liability of the supervisors here is based upon affirmative policies

that they acknowledge adopting concerning the manner in which the deceased was detained and force used. They are, by law, the officials charged with making such policies. Wanger v. Bonner, 621 F.2d 675 (5th Cir. 1980). The unconstitutional actions of the deputies who "acted pursuant to policy implemented by the" supervisors were a foreseeable consequence of their policies. Id. at 679. The evidence showed that their "liability was based upon affirmative policies that (they) acknowledged adopting." Id. 680. "Constructive knowledge of the illegal activities of subordinates may be imputed to a supervisor where it is shown that policies existed within his department of government entity the implementation of which resulted in a constitutional deprivation. Proof of the acceptance or support of such policy by the supervisor makes out the acquiescense in the illegal-

ity." Smith v. Hall, 510 F. Supp. 767 (D.C. Utah 1981), citing Norton v. McKeon, 444 F. Supp. 384, 387 (E.D. Penn. 1977).

The standard of the liability for supervisors followed by the circuit courts in Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978):

> "A person 'subjects' another to the deprivation of a constitutional right, within the meaning of section 1983 if he does an affirmative act, participates in another's affirmatives acts, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made... Moreover, personal participation is not the only predicate for section 1983 liability. Anyone who 'causes' any citizen to be subjected to constitutional deprivation is also liable. The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.

The crux of the issue is whether the supervisor caused the constitutional violation to be committed by the subordinate officer, not whether the supervisor participated directly in the unconstitutional act of the subordinate. Wanger, supra; McClelland v. Facteau, 610 F.2d 693, 695 (10th Cir. 1979); Sims v. Adams, 537 F.2d 829 (5th Cir. 1976). An affirmative act is not necessary as official policy can be "inferred from the omissions of a municipal supervisory officer, as well as from its acts." Turpin v. Mallet, 619 F.2d 196 (2nd Cir. 1983).

The supervisors are liable in that they failed in their statutory duty to properly train and supervise the officers, said failure caused the violations of the Plaintiff's constitutional rights. Whirl v. Kern, 407 F.2d 781, 795 (5th Cir. 1969). Deliberate indifference or gross negli-

gence in training and supervising is a proper basis of liability against the city and the supervisors. Owens v. Haas, 601 F.2d 1242 (2nd Cir. 1979). That there has been a failure to adequately train subordinate officers in necessary skills is a sufficient basis for liability. Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1974). The City charter clearly places the burden of supervision and training squarely on the shoulder of the main supervisors and therefore they are liable. See Whitehurst v. Wright, 592 F.2d 834 (5th Cir. 1979).

IV. In fashioning remedies in actions brought under 42 U.S.C. 1983 the federal courts must follow state procedural law

This court has repeatedly held that actions under 42 U.S.C. 1983 are essentially tort actions for injury to personal rights and thus state tort law and state procedural law are to be used in applying

remedies under 1983. Wilson v. Garcia, ____U.S.____, 105 S.Ct. 1938 (1985). Notwithstanding a wrongful death cause of action that was plead and proved in this case, the district court should have assessed statutory damages for wrongful death as provided by OCGA 51-4-2 &9 (Ga. Code Ann. 105-1302 & 1309). Although the court of appeals did reverse the damage award and remand for further proceedings it did not specifically order the award of state statutory damages for wrongful death, an award the district court specifically declined to make.

The legislative history of Section 1983 "demonstrates that it was intended to 'create a species of tort liability in favor of persons who are deprived of rights, privileges or immunitites secured' to them by the Constitution." Carey v. Piphus, 435 U.S. 247, 253 (1978) quoting Imbler v. Pachtman, 424 U.S. 409, 417, 96

S.Ct. 984 (1976). The Fifth Circuit has already ruled that Georgia's statutory scheme on wrongful death, including damages, should be applied in civil rights cases. In Brazier v. Cherry, 293 F.2d 401,405 (5th Cir. 1961), that court held "Georgia has supplied the law." "(W)e are of the clear view that Congress adopted as federal law the currently effective state law on general right of survival. This was done by Sec. 1988." Id., 405.

This Court has consistently held that 1983 actions for wrongful death and state wrongful death actions merge. Jones v. Hildebrant, 191 Colo. 1,550 P.2d 339 (1976), cert. dismissed as improvidently granted 432 U.S. 183, 189 (1977). In dismissing the petition the Supreme Court agreed with the merger theory, saying: "The question of whether a limitation of recovery of damages

imposed by a state wrongful death statute may be applied where death is said to have resulted from a violation of 42 U.S.C. Sec. 1983 would appear to make sense only where the 1983 damages claim is based upon the same injuries." Id. 432 U.S. at 187. In fact the district court accepted this theory and found unconstitutional excessive use of force here and then refused to allow separate recovery for the state law claims of assault of battery saying "The court is not permitted to award double compensation for the same injuries or separate theories of assault and battery in violation of Sec. 1983." (R-407).

This Court has read 420 U.S.C. Sec. 1983 to require the adoption of state law as "the principal reference point in determining survival of civil rights action." Robertson v. Wegman, 436 U.S.

584, 589 (1978). "The Court must apply state law, in fact, unless it is inconsistant with the policies underlying section 1983, "the district court initially admitted citing Robertson, supra (R-401). The Supreme Court has also said that state tort law is to be used in determining Sec. 1983 damages. Carey v. Piphus, supra 435 U.S. at 257.

Georgia law clearly provides that the next of kin have a cause of action for wrongful death OCGA 51-4-2 & 9 (Ga. Code Ann. 105-1309): "In cases where there is no person entitled to sue under the foregoing provisions of this chapter, the administrator or executor of the decedent may sue for and recover and hold the amount recovered for the benefit of the next of kin. In any case, the amount of the recovery shall be the full value of the life of the decedent." The "dependency" theory advanced by the

district court for denying damages for the full value of the life was not only an inconsistent interpretation of the law as it stands but this interpretation has been expressly rejected by the Georgia courts and legislature in enacting this statute. See Eldridge, Ga. Wrongful Death, Sec. 10-42: "Then in the mid-fifties the General Assembly put all wrongful death actions on an equal footing, only the relationship to the deceased had to be probed to impose the penal sanctions of the 'full value of the life of the decedent'".

Thus the policies underlying the state statutory authorized compensation are not in conflict with the policies underlying 1983 compensation. "The policies underlying Sec. 1983 include compensation of persons injured by deprivation of federal rights and pre-

vention of abuses of power by those acting under color of state law." Robertson, 436 U.S. at 591. Plaintiff can find no case in which any court, other than the district court below, found that statutory damages were too generous. (see R-435). Plaintiff is not asking to pursue an action in disregard of state law, as was the case in Robertson, 436 U.S. at 592. In fact, the Robertson court noted that it was reasonable to allow wrongful death actions to survive "only in favor of a spouse, children, parents or siblings." Id., 436 U.S. at 591. Thus there are no "questions of inconsistencies between state and federal law reaised under Sec. 1983." Id., 436 U.S. at 590.

CONCLUSION

This Court should grant certiorari to further clarify the contours of the liability of municipalities and supervisory officials in actions brought under 42 U.S.C. 1983.

Respectfully Submitted,

J.M. Raffauf
Attorney for Plaintiff/
Cross-Petitoner
1341 Thomas Road
Decatur, Georgia 30030
(404) 371-2222

CERTIFICATE OF SERVICE

I hereby certify that on February 6 1986, I served three copies of this cross-petition, upon the opposing party herein by mailing copies to their attorney of record, with first cla-s postage pre-paid:

Mary Carole Cooney
City of Atlanta Law Department
1100 Omni South
Atlanta GA 30335

This the 6 day of February, 1986.

J.M. Raffauf

APPENDIX I

APPENDIX II

The Plaintiff/ Cross-Petitioner, Emma F. Gilmere, hereby incorpoates by reference in this cross-petition Appendix I and Appendix III as contained in the Petition for A Writ of Certiorari in the case of R.C. Sampson v. Emma F. Gilmere, No. _____, Suprme Court of the United States.

J.M. Raffauf